Supreme Court, U.S.
FILED
JAN 27 1993
OFFICE OF THE CLERK

No. 92-779

IN THE

Supreme Court of the United States

October Term, 1992

CARLTON JOHNSON, *et al.*,

Petitioners,

v.

WEBB THOMPSON, M.D., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

THE NATIONAL LEGAL CENTER
FOR THE MEDICALLY
DEPENDENT AND DISABLED, INC.
James Bopp, Jr.*
Thomas J. Marzen
Victoria H. Pflug
50 S. Meridian, Suite 605
Indianapolis, IN 46204-3541
(317) 632-6245

(Counsel list continued on inside front cover)

**Counsel of Record*

January 28, 1993

Graphics LTD., Indianapolis, IN 46202

LAMPKIN, McCAFFREY &
TAWWATER
Ben T. Lampkin
Larry A. Tawwater
201 Robert S. Kerr, Suite 1100
Oklahoma City, OK 73102
(405) 272-9611

Counsel for Petitioners
Johnson, Smith, and Camp

St. John Barrett
1850 M Street, Suite 800
Washington, D.C. 20036
(202) 659-0304

Counsel for Petitioner
Spina Bifida Association of America

TABLE OF AUTHORITIES

CASES:	PAGE
Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) .	1
Hall v. Bellman, 935 F.2d 1106 (10th Cir. 1991)	2
Lawlor v. National Screen Serv., 349 U.S. 322 (1954) .	2

STATUTES, RULES, AND REGULATIONS:	PAGE
§ 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794	2, 3
Sup. Ct. R. 12.4, 40 U.S.C.A. § 131	2

No. 92-779

IN THE

Supreme Court of the United States

October Term, 1992

CARLTON JOHNSON, *et al.*,

Petitioners,

v.

WEBB THOMPSON, M.D., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

Both briefs in opposition argue, on the basis of legislative history and decisions by lower federal courts, that the ruling below was so clearly correct that review by this Court is unwarranted. Response of Physician Respondents, pp. 5-14; Brief in Opposition of Benjamin Demps, Jr., pp. 11-13. In thus arguing the merits of the question presented by the petition, the respondents ignore the admonition of this Court in *Bowen* that it was leaving this issue for another day. *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 624 (1986).

The brief in opposition filed by Respondent Demps further argues that this case is an inappropriate vehicle for resolving

the issue presented because: (1) this Court lacks jurisdiction to issue a writ, and (2) the case is moot.[1]

As to jurisdiction, Respondent Demps first suggests that there is no jurisdiction on certiorari because the District Court on June 27, 1989, granted summary judgment for the respondents on certain claims *other than* the First Cause of Action, which is the subject of this petition. But the First Cause of Action, which was the only claim under § 504 of the Rehabilitation Act of 1973, had been dismissed for failure to state a claim on June 22, 1987, and therefore was not before the District Court on June 27, 1989. Moreover, Respondent Demps urges that this Court lacks jurisdiction because petitioners have failed to designate certain appellees below as respondents here. The short answer to this is provided by Supreme Court Rule 12.4: All parties below are respondents here unless specifically excluded by written notice to the Clerk of this Court. The prescribed notice was not given in this case.

As to mootness, Respondent Demps argues that the denial of declaratory and injunctive relief on non-§ 504 claims by the Order of June 27, 1989, somehow renders moot the § 504 claim dismissed in 1987. Relief is necessarily tied to the claim for which it is sought. *See Lawlor v. National Screen Serv.*, 349 U.S. 322, 328-29 (1954). Thus, when the § 504 claim was dismissed, its associated prayers for relief were also dismissed. If the dismissal of the § 504 claim is reversed, then the claims for injunctive and declaratory relief — as well as for monetary relief — would still lie. Respondent Demps' additional argument that petitioners' § 504 claim has been "mooted" by evidentiary facts, if they are facts — that the physician respondents

---

[1] Other arguments asserted by Respondent Demps merely reflect a misapprehension of the standard of review of a dismissal for failure to state a claim. A court, reviewing *de novo* the sufficiency of a complaint, must accept the truth of the allegations, construe them liberally, and reverse unless it appears that plaintiff could prove no set of facts in support of his claim at trial that would entitle him to any relief. *Hall v. Bellman*, 935 F.2d 1106, 1109 (10th Cir. 1991).

are not employed by the hospital or that they do not receive federal funds — is equally frivolous.[2]

CONCLUSION

The opposing briefs suggest no substantial reason why the present case is an inappropriate vehicle for review of the issue left open in *Bowen*. Therefore, petitioners request that this Court grant the petition for a writ of certiorari to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

THE NATIONAL LEGAL CENTER
FOR THE MEDICALLY
DEPENDENT AND DISABLED, INC.
By James Bopp, Jr.*
Thomas J. Marzen
Victoria H. Pflug
50 S. Meridian, Suite 605
Indianapolis, IN 46204-3541
(317) 632-6245

(Counsel list continued on next page)

**Counsel of Record*

---

[2] Respondent Demps initially asserts that the amended complaint is itself deficient since petitioners have "never pleaded, that co-respondent physicians were employees of Childrens' Hospital of Oklahoma." Brief in Opposition of Benjamin Demps, p. 10. However, the First Cause of Action of the amended complaint, regarding § 504, specifically alleges: "Defendants are or have been agents, employees, or contractors of the State of Oklahoma or individuals or entities acting in concert with the agents, or contractors of the State of Oklahoma . . . ." Pet. App. 8. It was further alleged by the petitioners that the Children's Hospital of Oklahoma is owned and operated by the State. *Id.*

LAMPKIN, McCAFFREY &
TAWWATER
Ben T. Lampkin
Larry A. Tawwater
201 Robert S. Kerr, Suite 1100
Oklahoma City, OK 73102
(405) 272-9611

Counsel for Petitioners
Johnson, Smith, and Camp

St. John Barrett
1850 M Street, Suite 800
Washington, D.C. 20036
(202) 659-0304

Counsel for Petitioner
Spina Bifida Association of America